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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

JASON JERMARR JOHNSON,

Defendant and Appellant.

E044698

(Super.Ct.No. INF047290)

OPINION

APPEAL from the Superior Court of Riverside County. John J. Ryan, Judge.  
(Retired judge of the Orange Super. Court, assigned by the Chief Justice pursuant to art.  
VI, § 6, of the Cal. Const.) Affirmed with directions.

Kevin D. Sheehy, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant  
Attorney General, Gary W. Schons, Assistant Attorney General, Rhonda Cartwright-  
Ladendorf, Christine Levingston Bergman and Meredith Strong, Deputy Attorneys  
General, for Plaintiff and Respondent.

## 1. Introduction

A jury convicted defendant Jason Jermarr Johnson of three felony sexual offenses, first degree burglary, assault, and related enhancements. Johnson was also found guilty of prior offenses. The court sentenced defendant to an aggregate prison term of 55 years to life.

On appeal, Johnson raises *Faretta*<sup>1</sup> and *Marsden*<sup>2</sup> issues. Both parties agree the abstract of judgment is in error and defendant is entitled to additional custody credit of one day.

We affirm the judgment with directions to modify it accordingly.

## 2. Factual and Procedural Background

The information filed on July 21, 2004, charged defendant with offenses committed on May 4, 2004. Over the next several years, the trial court entertained multiple *Faretta* and *Marsden* hearings, concerning defendant's requests for self-representation and for a different attorney. On May 14, 2007, the trial court granted a *Marsden* motion and appointed Arnold Lieman to serve as trial counsel for defendant. The trial was conducted in October 2007. The sentencing occurred in December 2007.

On the morning of May 4, 2004, a man knocked on doors in La Quinta and Palm Desert neighborhoods, ostensibly looking for gardening work. The neighbors he approached described him as a young African-American with dreadlocks. He was short

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<sup>1</sup> *Faretta v. California* (1975) 422 U.S. 806.

<sup>2</sup> *People v. Marsden* (1970) 2 Cal.3d 118.

or medium height. He wore either navy pants or shorts and a navy-and-white-checked shirt or a pair of silk basketball shorts with a towel or shirt around his neck. Two neighbors observed him driving a “gray primer” Oldsmobile with a temporary registration sticker. He asked a woman in Palm Desert if her husband was at home. When she answered that he was, the man departed. Several people called the police. All of the contacts with the neighbors occurred between 6:54 a.m. and 7:30 a.m. within a five-mile radius.

While her mother gardened outside their Palm Desert home, Jane Doe looked out her bedroom window and saw an African-American man with braided hair, walking up the driveway. He wore a white T-shirt on his head, a blue plaid shirt, and dark jeans or baggy shorts. When she left her bedroom, she found him standing in the hallway of the front entrance. He approached her saying, in effect, “this could be easy[,] this could be hard,” while grabbing her crotch. As Doe struggled to escape, the man wrestled her on to the couch and began choking her. Doe’s mother entered the room and Doe, fearing she would be killed, yelled at her mother to call the police. Doe kicked and fought the assailant until he punched her on the head. Dazed and dizzy, she fell back on the couch. He lifted up her legs and pushed his fingers into her vagina. Then he released her and left by the front door.

Doe called the 911 operator at 7:30 a.m. She reported the incident had “just occurred.” She described the attacker as a Black man with braids, dressed in a blue plaid shirt, blue shorts, and tennis shoes, and wearing a white T-shirt on his head.

In viewing a photographic lineup which included defendant's picture, Doe identified a different man but also said she was not certain because none of the men depicted wore braids. The next day, she viewed a second photographic lineup, which included a recent picture of defendant and other men with dreadlocks. Doe immediately said, "That's him." Three witnesses identified defendant in photographic lineups. Doe also recognized defendant in court, as did the other witnesses.

The police found defendant in possession of clothing like that described by Doe and the witnesses. Other evidence connected defendant to a gray-primer car.

Defendant's girlfriend gave inconsistent testimony that contradicted earlier statements. She resisted testifying and, at some points, she admitted to lying.

Doe's injuries included difficulty swallowing and pain in the genital area. She sustained a torn fingernail and bruises, abrasions, or marks on her neck, chest, knees, inner thigh, and vaginal area.

Defendant's DNA profile was consistent with the DNA of fingernail scrapings taken from the victim.

### 3. Faretta Motion

At defendant's sentencing hearing in December 2007, he asserted his fifth *Faretta* motion, which the court denied summarily.

Defendant's reliance on *People v. Miller* (2007) 153 Cal.App.4th 1015, 1023-1024, does not help him, as discussed in the California Supreme Court case, *People v. Doolin* (2009) 45 Cal.4th 390, 452-455.

In *Doolin*, on the day of sentencing, defendant made a *Marsden* motion, which was denied, followed by a *Faretta* motion. The Supreme Court stated: “The right of self-representation is absolute, but only if knowingly and voluntarily made and if asserted a reasonable time before trial begins. Otherwise, requests for self-representation are addressed to the trial court’s sound discretion. (*People v. Windham* (1977) 19 Cal.3d 121, 127-129.) . . .

“On appeal, a reviewing court independently examines the entire record to determine whether the defendant knowingly and intelligently invoked his right to self-representation. (*People v. Stanley* (2006) 39 Cal.4th 913, 932.)” (*People v. Doolin, supra*, 45 Cal.4th at p. 453.) A legitimate concern of the trial court is whether defendant’s request is untimely and would needlessly delay trial. (*Id.* at p. 454.) A motion made after the guilt phase is untimely and subject to the trial court’s discretion. (*Ibid.*, citing *People v. Mayfield* (1997) 14 Cal.4th 668, 810.)

*Doolin* distinguished the *Miller* case, commenting: “The circumstances of defendant’s posttrial request for self-representation are in stark contrast to a recent Court of Appeal decision that held such a motion in a noncapital case is timely if made ‘a reasonable time prior to commencement of the sentencing hearing.’ (*People v. Miller* (2007) 153 Cal.App.4th 1015, 1024.) In *Miller*, the defendant moved for self-representation after the jury rendered its verdict and a new trial motion was made and denied, but more than two months before the scheduled sentencing hearing. . . . In holding the trial court erred by denying the defendants motion as untimely, the court observed that concerns about trial delay or disruption do not apply to separate sentencing

hearings. (*Id.* at p. 1024.) Because the [*Mitchell*] defendant's request was timely, he 'had an absolute right to represent himself at sentencing and the trial court was required to grant his request for self-representation, which was unequivocal, as long as he was mentally competent and the request was made "knowingly and intelligently, having been apprised of the dangers of self-representation.'" In [the *Doolin*] case, for the reasons stated, defendant's right to self-representation at sentencing was not absolute but subject to the court's discretion." (*People v. Doolin, supra*, 45 Cal.4th at p. 455, fn. 39.)

In the present case, defendant waited until two months after his trial to make a *Faretta* motion on the very day of his sentencing in an effort to achieve further delay. Under these circumstances, the decision by the trial court to grant or deny defendant's *Faretta* motion was entirely discretionary. (*People v. Doolin, supra*, 45 Cal.4th at pp. 452-455.) It did not depend on whether the court had announced its order denying defendant's new trial motion.

#### 4. Marsden Hearing

Defendant also argues the trial court, at its own instigation, should have conducted a *Marsden* hearing. (*People v. Mendez* (2008) 161 Cal.App.4th 1362, 1364-1369; *People v. Mejia* (2008) 159 Cal.App.4th 1081, 1084-1088.) Both *Mendez* and *Mejia* are distinguishable in that they involved a defendant's complaint about counsel's performance. Here defendant did not assert his trial counsel's performance was inadequate, offering no basis on which to conduct a *Marsden* hearing.

5. Disposition

We affirm the judgment with directions to correct the abstract of judgment to state: 1) defendant's conviction on count 5 was for "assault by force likely to cause great bodily injury" (Pen. Code, § 245, subd. (a)), not assault with a deadly weapon (Pen. Code, § 192.7, subd. (c)); and 2) defendant has 1,311 days of actual custody, plus 196 conduct days, for total credit of 1,507 days.

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s/Gaut  
J.

We concur:

s/McKinster  
Acting P. J.

s/King  
J.